SUPREME COURT, U. S.

No. 1026

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, SUNRAY DX OIL COMPANY, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Respondents.*

REPLY MEMORANDUM OF PETITIONERS

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Petitioners, Skelly Oil Company, *et al.*, file this reply to the pleading submitted herein on May 22, 1964, denominated "Brief for Public Service Commission of the State of New York".

The court below held that the Commission has the power to order reparations of amounts collected pursuant to unconditional temporary certificates and remanded the proceedings for "further development and fuller consideration of equitable factors" involved.[1] The petition in No. 1026 is limited to the question of whether the Commission has the *power* to order reparations of amounts collected pursuant to unconditional temporary certificates.

[1] See, Petition No. 1026, p. 25a.

Although the Public Service Commission of the State of New York (New York Commission) apparently does not oppose the granting of *certiorari* for consideration of this limited issue, it attempts to add an entirely new issue not contemplated in No. 1026 (P.S.C. Br. 15). Thus, New York Commission advocates that the Commission *must* order reparations, a position which it urged in the court below but which that court rejected when it remanded for further proceedings (Pet. No. 1026, p. 25a). Quite obviously, New York Commission does not support the decision below which remanded for a determination of "equitable considerations", but seeks reversal of the decision because the lower court held that the Commission may refuse to order reparations, if it finds it equitable to do so.

Plainly, New York Commission would misuse the procedures of this Court. For, as a respondent, it may not, through its brief in opposition to the petition in No. 1026, seek to overturn the decision below on grounds not presented in the petition. New York Commission's attempt to inject into No. 1026 a contention that the decision below should be reversed, because of the Court's refusal to hold that reparations must be ordered, violates the "inveterate and certain" rule that a party may not, in the absence of a cross petition, "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary. . . ." *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435 (1924); *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937)[2]

[2] See also, Stern & Gressman, Supreme Court Practice, pp. 261-262, 264, §§ 6-49 and 6-50 (3rd ed. 1962).

This Court has long insisted that "A respondent or an appellee may urge any matter appearing in the record *in support of a judgment*, but he may not attack it *even on grounds asserted in the court below*, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him" (Emphasis added, footnotes citing numerous precedents omitted). *Le Tulle v. Scofield*, 308 U.S. 415, 421-422 (1940).[3] Yet New York Commission asks this Court to reverse the decision below when it attacks that decision because of the lower court's refusal to hold that reparations must be ordered.

It should be noted that this "inveterate and certain" rule has firm basis in fairness to the parties and assists the Court through a more complete and orderly presentation of arguments. Conversely, because cases arising on petitions for writs of *certiorari* are referred to the Court promptly after submittal of opposing briefs, it is obvious that New York Commission's attempted to circumvent filing of its own petition would effectively deny to Petitioners opportunity to file a brief in opposition and would leave this Court with an inadequate presentation of arguments.

Obviously, New York Commission's "brief" fails to comply with the Rules of this Court relating to petitions for *certiorari*. Accordingly, Petitioners in No. 1026 urge that

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[3] New York Commission's request that the Federal Power Commission be redesignated as an intervenor-petitioner (P.S.C. Br. p. 15) emphasizes the true nature of its position in opposition to the decision below. Of course, New York Commission cannot by such a stratagem escape the fact that it, not the Federal Power Commission, is a would-be petitioner.

(1) the Court deny New York Commission's request that the issues herein be broadened; and

(2) the Court specify that it will consider only the issue raised in the Petition in No. 1026, namely, the power of the Commission to order reparations of amounts collected pursuant to unconditional temporary certificates.

Respectfully submitted,

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